

# Photography Legal Issues

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# Legal issues for Photographers

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- Copyrights
- Model Releases
- Taking Photos in Public

# Copyright

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- Your rights as a photographer are protected by none other than:

## U.S. Constitution

- **Article 1 Section 8** - The Congress shall have Power: To promote the Progress of Science and **useful Arts**, by securing **for limited Times** to **Authors** and Inventors the **exclusive Right** to their respective Writings and Discoveries;



# How does that affect Photographers?

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- ❑ Photography is a “Useful Art”
- ❑ “For Limited Time” – Your life + 70 years
- ❑ “To authors” – That’s you the Photographer
- ❑ “Exclusive Rights” – power to control photo



# What is a Copyright

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- ❑ Form of protection that gives photographers exclusive rights to use and reproduce their work
- ❑ Copyright is Federal Law not State Law, so law is uniform throughout U.S.
- ❑ U.S. has signed international Copyright agreements, so effectively copyright is generally global



# Copyright

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- ❑ From the instant the shutter clicks you have copyright on your photo.
- ❑ Exception – If work is created by an employee as part of his/her duties under a “work for hire” contract
- ❑ Photograph does not have to be registered with the any government agency to be Copyrighted.



# What rights does a Copyright give you?

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- Make copies
- Distribute copies
- Display the image publicly
- Make modifications (Photoshop)
- Sell image to publisher
- Sell copyright to publisher



# Limitations on Owner's Rights

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- “Fair Use doctrine” allows limited copying of copyrighted works for educational and research purposes.
- Reproduction for purposes such as:
  - Criticism, news reporting, teaching, scholarship, or research, is not infringement
  - Rules for determining fair use:
    - Nature of copyrighted work – factual or artistic
    - Purpose of use – commercial or not profit
    - Portion used versus work as a whole
    - Effect of use on potential market or value - **Key**

# Term of Copyright - Public Domain

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## Date of Work

- Created Jan 1, 1978 or after
- Created before Jan 1, 1978 and published by Dec. 31, 2002
- Published from 1963-1977
- Published from 1923 – 1963
- Published before 1923

## Term of Copyright

- Photographer - Life + 70 Years
- Corporation - 95 years from publication or 120 years from creation
- Life + 70 Years or Dec. 31, 2047 which ever is greater
- 95 years when published with notice
- 67 years when published with notice
- In public domain

# Published

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- ❑ Publication is the distribution of copies of a work to the public by sale of other transfer of ownership, rental, lease, or lending
- ❑ Publishing requires “broad” distribution
- ❑ Publishing a photo book & giving or even selling it to friends and relatives is not “distribution”
- ❑ The line is vague but must be clearly crossed
- ❑ Public display of a photograph does not constitute publication



# Copyright Notice

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- You do not have to publish a Copyright notice.
- Since March 1989 copyright notice is no longer required for published works.
- Notice is voluntary but recommended.
- Proper notice is Year and a name.

**Copyright © 2009, Kent Messamore**

**Hold down Alt Key & type 0169 on Numeric Key Pad**

# Infringement

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- Unauthorized use of a photograph without the Copyright Owner's permission is called “**Infringement**”
  - use of whole or part of an image without permission
  - use beyond the scope of license
  - Modifying an image without permission
  - asking another photographer to recreate the image



**Theft**

# Infringement of a Copyright – True or False

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- If an image is on the internet it is in the public domain?
- If there is no copyright notice on image it's OK to copy?
- Acknowledge the source and it's OK to use?
- If you don't profit from use, you don't need permission?
- If you alter image 50%, you don't need permission?
- If you only use part of image, you don't need permission?
- If you receive notice from the owner and you take it down, you don't owe him any money?

# Penalty for Infringement

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- ❑ Substantial monetary damages can be awarded (actual damages, profits)
- ❑ Statutory damages (\$750-\$30,000 and up to \$150,000 if the infringement was willful)
- ❑ Judge may order copies destroyed
- ❑ Attorney's fees
- ❑ Criminal offense under some circumstances



# Advantages of Registering Copyright

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- You get additional benefits.
- Registration establishes a public record, which is necessary if you need to sue someone in court for infringement.
- If you win your case, you may also be eligible for statutory damages and attorney's fees.

# How Do I register my photo(s)?

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□ <http://www.copyright.gov/forms/>

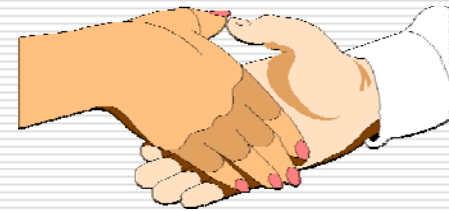
- **Application** - A series of screens prompts you for information.
- **Payment - \$35** - You can pay with your credit/debit card, or by setting up a deposit account.
- **Provide Photograph(s) to be Registered – Either:**
  - Upload digital copy of your Photograph(s)
  - Print out a shipping slip to be attached to your work for delivery by U.S. Postal Service.



# What is a Model release?

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- ❑ Document stipulating terms under which the photographer may use pictures of a model
- ❑ Can say what ever the photographer and model agree on
- ❑ Can be retroactive (shoot first and get a release months later)
- ❑ Should be in writing (pencil is ok)
- ❑ If you get push back on your “standard” release, simply write in the extra provisions & initial
- ❑ Getting a model release at the same time as you take photos is very convenient



## Why do you need to know about Model Releases?

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- Knowing legal rights will make you a better photographer.
  - You can compose to avoid risk.
  - You can protect yourself by acquiring rights.
- Motive behind law suits is usually not \$\$\$ but emotion.
- No book or training can completely protect you, so obtain legal advice if risk is high.
  - Law is vague in many situations.
  - Law varies from state to state, country to country.
  - Most lawyers not familiar with 1<sup>st</sup> amendment issues

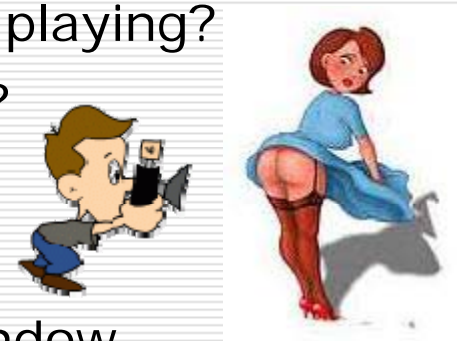


# This is a test of your understanding!

## Do you need a Model Release to protect yourself?

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- You take portrait at a Camera Club? Do you need a release?
- You own a Portrait Studio. Must the client sign?
- You are in a mall and photograph some people?
- You are in a mall and photograph some kids playing?
- On a beach and photograph a girl in a bikini?
- You photograph a woman naked?
- You photograph a male under 18 naked?
- With 600 mm lens you shoot woman in a window
- You photograph a pet?
- You photograph a person's house?
- You photograph a public building?



# “Image Use” is the Key Question

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- ❑ Answer is “no, you don’t need a Model Release to protect yourself”.
- ❑ Photographer’s need for a Model Release is a **business need not a protection need**
- ❑ Who has liability for the **use** of a photo? **The publisher**
- ❑ Photographers typically don’t get sued, Publishers do.
- ❑ **You are not responsible for how others use photos you sell to them!**
- ❑ A legal question that Publishers may be faced with is, “do you have a release?” If the answer is “no” **he**, not you, may be in trouble.
- ❑ If “yes” the next question will be, “what does the release say?”
- ❑ If answer is “the photographer said I didn’t need one” you’re now involved.
- ❑ You’re response to buyer should be, “I don’t know if **use** requires a release.”
- ❑ Few publishers will purchase image without **written** Model Release (11 states will not accept verbal model release)

# What is “Publishing”?

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- ❑ In some cases however the Photographer is also the Publisher
- ❑ Publishing requires “broad” distribution
- ❑ Publishing a photo book & giving or even selling it to friends and relatives is not “distribution”
- ❑ The line is vague but must be clearly crossed
- ❑ Photos displayed on a website
  - ❑ For purposes of portfolios, no issues – you are an [artist](#)
  - ❑ For purposes of selling images – this is not a form of publishing. It has been defined as a “vehicle of information”



# Where do Photographer rights come from?

- **Editorial Use** - First Amendment under US Constitution allows great freedom to publish artwork for editorial use (illustrate articles that are newsworthy or of public interest, art books, exhibits)



- **Commercial Use** - has only limited First Amendment protection

# What is Editorial Use?

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- Newsworthiness
- Courts have defined it broadly
  - Public interest
  - Current events
  - Factual data
  - Educational
  - Historical
  - Entertainment
  - Art



# What is “Commercial Use”?

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- Advertising
- Promoting a Product
- Endorsing an idea
- Support for political or religious view
  
- Usually must injure the economic interests of the person in the photo



# In plain English – Generally!

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- ❑ Model owns rights to their image – (Right to Publicity)
- ❑ Model Release gives up some of the Model's Rights.
- ❑ Photographer owns rights to the photograph from the moment the shutter clicks. (Copyright)
- ❑ Photographer can use image for artistic, editorial and educational purposes, without a signed release, including using photo in his/her portfolio either printed or on internet. (1<sup>st</sup> amendment trumps Publicity).
- ❑ Photographer cannot use photo commercially without a release (Publicity trumps Commercial Use)

## What about taking pictures outside the studio?

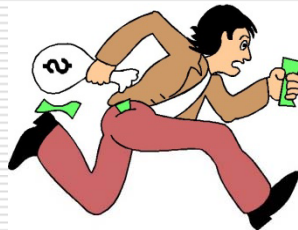
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- ❑ You should be aware of risks to subjects  
“Right of Privacy”
- ❑ Right of Privacy. Court recognizes 4 “Torts”
  - (A Tort is a wrongful act for which a civil action can be brought)
  - ❑ **Appropriation** – Use of a person’s likeness for trade or advertising without consent.
  - ❑ **Intrusion** – A physical intrusion into a person’s private space.
  - ❑ **Public disclosure** - Of embarrassing private facts about an individual that would be highly offensive to a reasonable person.
  - ❑ **False Light** – Publication of false, highly offensive information about an individual
- ❑ Most states give recognition to some or all 4 of the privacy torts
- ❑ Right to Privacy is an evolving & growing branch of law & many questions remain unsettled

**Appropriation** – Use of a person’s likeness for trade or advertising without consent.

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- ❑ Oldest & long recognized of privacy torts.
- ❑ Two issues involved
  - Money \$\$\$
  - Reputation
- ❑ It is the most likely for plaintiff to win
- ❑ Defenses to claim of Appropriation
  - Newsworthiness
  - Political speech
  - Consent
  - Subject not recognizable



## Intrusion – A physical intrusion into a person’s private space.

- ❑ Information gathering, not a publication tort
- ❑ Person is entitled to expectation of seclusion when reasonable to expect that others will not interfere
- ❑ Actions that may violate this tort include trespass, hidden cameras, lying to sources, and fraudulent entry
- ❑ Generally if in a public place you can photograph anything you see, except
  - You can’t harass or create a disturbance
  - Can’t use photographic equipment to enhance vision ([telephoto lens](#)).
- ❑ Intrusion Defenses
  - Photographer did not go onto private property
  - Consent
  - Right to go onto property with police/fire officials



## False Light – Publication of false, highly offensive information about an individual

- ❑ Similar to libel and courts often have trouble distinguishing between the two.
- ❑ Three kinds of False Light
  - Distortion – photos out of context
  - Embellishment
  - Fictionalization
- ❑ False Light defenses
  - Truth
  - Individual was not identified
  - Privileged source (Reporters)
  - Actual malice proof required by plaintiff
  - Not offensive to reasonable person
  - Consent



# Public Disclosure - of embarrassing private facts about individual

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- ❑ Publicity concerning private life of another subject to liability if:
  - Highly offensive to a reasonable person
  - Is not of legitimate concern to the public.
- ❑ Photographers almost never lose because the defenses are strong
- ❑ Public disclosure defenses
  - Newsworthy
  - Consent
  - Facts were never made public
  - Not truly private facts
  - Individual not identified
  - Not offensive to a reasonable person



# Taking photos in Public

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- ❑ Generally, people in public areas have no expectation of privacy so the photographer does not violate right of privacy when taking photos.
- ❑ Generally, public view can be photographed. Private places require consent.
- ❑ Beware of the context in which the picture is placed
  - E.G. woman standing next to an aids prevention sign
- ❑ Public figures & public events have less right to privacy than do private person/events.
- ❑ In some states, using hidden cameras, or zoom lenses may invite criminal or civil penalties.
- ❑ Intrusion can occur as soon as the image is taken.
- ❑ Privacy laws vary widely from state to state
- ❑ Law often is unclear

# Releases for Property

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- ❑ State right of privacy and publicity laws only protect individuals
- ❑ Copyright Act permits taking of photographs of building from public spaces
- ❑ May be State and Federal trademark law infringement
- ❑ Not a lot of legal protection but to make photograph more commercially saleable you should obtain a Property release.



# What to do if Confronted?

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- Generally, public view can be photographed.
- There are exceptions to this general rule:
  - Commanders of military installations can prohibit photos to protect national security.
  - U.S. Department of Energy can also prohibit photos of Nuclear facilities
- Most confrontations are by security guards; on occasion police
  - They do not have the right to prohibit you from taking photos in public places
  - They can ask you to move away if you are impeding activities or endangering safety
  - They can not legally confiscate your photos
- Most confrontations can be defused by being courteous and respectful
- Above all use good judgment and don't allow event to escalate to violence

# Releases for Animals

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- No laws requiring



- Animals owned by people who make money from the commercial exploitation of the animal should be released. Animal's owner should provide a property release.

# Check list for need for a release

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- ❑ **Can you identify the subject uniquely as a person?**
- ❑ **Does the use of photo **associate** the subject with:**
  - Promotion of a product or idea?
  - Support for a political, religious or other view point?

**Usually it's the text associated with the photo that is objectionable**

- ❑ **How was the photo taken?**
  - In public or studio
  - Were laws broken
- ❑ **Was there compensation?**
  - California requires compensation
  - New York does not

# What should my release practice be?

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- ❑ Get a release for every photo I take?

Of course not!

- ❑ Advertising your photos for sale (e.g. on the Internet) does not require a release
  - selling a photo is not publishing the photo.
- ❑ Get releases on photos of recognizable people you expect to sell.
- ❑ As long as you disclose to the buyer whether you have a release or not **you have no liability!**
- ❑ When public photo is used editorially, person in the photo can get emotional when you show photos without permission. You may be within your rights but do you want to anger folks?
- ❑ If you put a photo in your portfolio and you receive a “**Cease and desist**” letter, do you want the hassle or should you just remove the photo?

# “Model Release” advice for Models

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- ❑ Model owns rights to their image – ([Right to Publicity](#))
- ❑ Photographer owns rights to Photographs ([Copyright](#))
- ❑ You will be asked to sign Model Release which [grants image use rights to Photographer](#) in return for \$\$\$ or trade (TFP/TFCD)
- ❑ Never sign away full Rights
  - Retain rights to use your own photos for portfolio
  - Ask for copies of all photographs
  - If uncomfortable restrict potential image use
- ❑ Expect to show ID to prove over 18
- ❑ If under 18 you can't sign; guardian must

# Model Releases

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Pocket Model Release

EI Model Release

- Valuable Consideration
- Photographer & assigns
- Irrevocable
- Unrestricted
- Right to use & Publish
- Any manner & medium
- Alter & compose
- Without approval
- Release all liability

• Consideration of Models Requirements

# Sources

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- ❑ “Legal Handbook for Photographers” Bert Krages
- ❑ “Legal Guide for the visual Artist” Tad Crawford
- ❑ “A Digital Photographer’s Guide to Model Releases” Dan Heller
- ❑ “The Professional Photographer's Legal Handbook” Nancy E. Wolff
- ❑ “Communication Law in America” Paul Siegel
- ❑ “The Photographer’s Right” Bert P. Krages II